86-434

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County,

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether provisions of the California Elections Code substantially infringe on the rights of a state political party and its members to freedom of speech and association under the First Amendment where the provisions do not conflict with the policies of the party. The challenged provisions prohibit state and county central committees of a ballot-qualified state political party from endorsing, opposing or supporting candidates for their party nominations at the primary election and prescribe the membership, organization, procedures and the term of the chairperson of the state central committee.

If the provisions are held to be a substantial infringement, whether the state's interests in an orderly and democratic electoral system justify the infringement.

Whether in the absence of a conflict between the provisions of the Elections Code and the policies of the state political party, article III of the United States Constitution and the principles of justiciability and abstention developed by this Court permit a federal court to determine the aforesaid issues if they are raised by anyone other than the party and in particular by the plaintiffs in this case.

Whether summary judgment invalidating the aforesaid provisions of the Elections Code can be entered pursuant to rule 56 of the Federal Rules of Civil Procedure where: 1) defendants presented evidence that the provisions reflected the policies of the state political party

and had been enacted at the behest of or with the active support of the political party; 2) despite defendants' demonstration of need for it to respond to the motion for summary judgment, they were denied any opportunity to conduct discovery and to present further evidence; and 3) the judgment is based on declarations and documentation which are not admissible evidence.

Whether the Eleventh Amendment to the U.S. Constitution permits a federal court to determine that violation of the provisions of the Elections Code by plaintiffs would constitute criminal conduct subject to prosecution by defendants. All defendants attested that they have never been involved in enforcement action of any kind with respect to any of the challenged provisions and asserted without contradiction by California legal precedent that violation of these provisions by plaintiffs does not constitute criminal conduct.

If the Eleventh Amendment does not preclude jurisdiction, whether a case or controversy required by article III exists with respect to such defendants or whether abstention is required in such circumstances.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is set forth in the Appendix (App.) hereto at pp. 2a-41a, is reported at 792 F.2d 802.

The orders and judgment of the United States District Court for the Northern District of California are not reported. They are set forth at App. 42a-78a.

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JURISDICTION

This appeal is from the final judgment of the United States Court of Appeals for the Ninth Circuit filed June 18, 1986, affirming summary judgment entered by the United States District Court for the Northern District of California on April 16, 1984.

The District Court held that provisions of the California Elections Code violated the Freedom of Speech and Free Association Clauses of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and 42 U.S.C. § 1983, and were therefore invalid. The District Court enjoined appellants from enforcing said provisions.

The affected provisions of the Cal. Elec. Code prescribe the membership of the state central committees of the California Republican and Democratic parties, the terms of the chairpersons of the state central committees of the California Libertarian and Republican parties and prohibit endorsements by state and county central committees of primary ballot-qualified state political parties of candidates for their respective party's nominations at the primary election.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b). By order filed

August 14, 1986, the Court of Appeals has stayed issuance of its mandate pursuant to Fed. R. App. P. 41(b), until disposition of the appeal if it is docketed with this Court by September 16, 1986. (App. 82a.)

Notice of appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on behalf of all appellants on August 14, 1986. (App. 79a-81a.)

This appeal is being docketed in this Court within 90 days from the entry of judgment below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .

Fourteenth Amendment, United States Constitution:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Federal Rules of Civil Procedure, rule 56:

. . .

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . .

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

California Constitution, article II, section 6.

California Elections Code sections:

37 (defines non-partisan office),

8660, 8661, 8663, 8664, 8665, 8667 and 8669 (membership of the Democratic State Central Committee);

8710 (time for meeting of Democratic State Central Committee);

8920 and 8921 (time and place for first meetings of Democratic county central committees);

9160, 9160.5, 9161, 9161.5, 9162, 9163, 9164 (membership of Republican State Central Committee);

9210 (time for first meeting of Republican State Central Committee);

9274 (term of chairperson of Republican State Central Committee);

9275 (limitation on dues for members of Republican State Central Committee);

9420 and 9421 (time for meeting of Republican county central committees);

9800 (applicable to meeting of the Libertarian State Central Committee);

9816 (applicable to term of chairperson of Libertarian State Central Committee);

9818 (applicable to dues payable by members of Libertarian State Central Committee);

9830, 9840 and 9841 (applicable to meetings of Libertarian county central committees);

9855 (applicable to dues payable by members of Libertarian county central committees);

11702 (prohibits endorsement by party state and county central committees of candidates for the party's nomination for partisan office at the primary election);

29102 (provides penalties for violations of laws relating to elections);

29430 (provides a penalty for claiming an endorsement as official candidate of political party in the primary election).

The text of the foregoing provisions of the California Elections Code and California Constitution are set forth in App. 288a et seq.

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STATEMENT OF THE CASE

As the opinion of the U.S. Court of Appeals for the Ninth Circuit in this case notes, at the turn of this century California adopted a direct primary election system "which transferred the power to nominate candidates from party organizations to the voters themselves." (App. 7a.) Early in the evolution of the primary election system, State law required ballot-qualified political parties to maintain state and county central committees. (*Id.*) State law prescribes the membership of the state and county central committees for each of the ballot-qualified parties, the terms of the chairpersons thereof and other organizational and procedural features of these committees.[1]

By political tradition in California the predecessors of the statutorily mandated committees did not endorse candidates for the nomination of their party at its nominating conventions. The role of central committees in the pre-primary election era had been to accept and campaign for the conventions' nominees. The primary election law expressly provided that the committees are to conduct the *party* campaign for its nominees selected at the primary

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1. Cal. Elec. Code §§ 8660 and 8820, et seq. (Democratic Party); 9160 and 9320, et seq. (Republican Party); 9640 and 9700, et seq. (American Independent Party); 9790, et seq. and 9830, et seq. (Peace and Freedom Party); 9995 (other ballot-qualified parties, including the Libertarian Party, must adopt one of the foregoing central committee structures).

election.[2] California law did not expressly prohibit the committees from endorsing candidates for their respective party's nominations.

However, an opinion issued by the Attorney General of California in 1954 (App. 140a-148a) reviewing the history of the primary election law and the practices of party central committees pursuant to that law concluded that pre-primary endorsements by central committees were inherently inconsistent with their statutorily mandated duty of conducting the party campaign for the nominees selected by the members of the party at the primary election so that the practice was impliedly prohibited by law. The incompatibility of pre-primary endorsements and the duty of conducting the party campaign was acknowledged to be readily apparent from the tradition of abstinence by the committees themselves and the common sense conclusion that a committee which has opposed a candidate or endorsed an opponent of a candidate who is actually nominated by the members of the party at the primary election will in all likelihood be incapable, or less capable than it could be, of carrying out the party's campaign for that candidate. (*Id.*)

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2. The state central committees are mandated by statute to "conduct *party* campaigns for this party and in behalf of the candidates of this party" (emphasis added) and this is virtually the sole duty mandated by statute to these committees. (Slip opn. of Ninth Circuit (App. 9a). Cal. Elec. Code §§ 8776 and 8940 (Democratic Party); 9276 (Republican Party); 9688 (American Independent Party); 9819 (Peace and Freedom Party).) §§ 8940, 9440, 9740 and 9850 mandate county central committees in virtually identical language:

"A committee shall have charge of the party campaign under general direction of the state central committee or of the executive committee selected by the state central committee."

In 1963, California enacted a "Truth in Endorsements Law" (Cal. Elec. Code § 11700 et seq.) which prohibited publications appearing to endorse candidates for the nomination of a ballot-qualified party in primary elections that utilized identifying words contained in the name of the party unless a prescribed statement that the "endorsement hereon is by an unofficial political group" appeared on the publication. Criminal sanctions were established for claims by a candidate for the nomination of a political party for partisan office or on behalf of a candidate that he or she is the officially endorsed candidate of the party. (Cal. Elec. Code § 29430 at App. 303a.)

The statute was enacted to combat a widespread practice of particular organized factions within the ballot-qualified parties of publishing slates of endorsements which misled voters into believing the endorsements had been made by the political party. Such representations were inherently fraudulent because the primary election system establishes the votes of the members of the party at the primary election as the voice of the party and the official determiner of the candidates of the party. As part of this statute, the implicit prohibition on endorsements by central committees was made explicit for the first time by enactment of the predecessor to Cal. Elec. Code § 11702. (App. 303a.)

None of the named defendants has ever been involved in the enforcement of the prohibition of Elec. Code § 11702 and none of them has viewed a violation thereof as constituting a criminal offense defined by any provision of the Cal. Elec. Code. (App. 98a-104a and 125a-139a.) Elec. Code § 11702 is not a penal statute. Elec. Code § 29430 is

a penal statute which applies only to a "candidate" or "other person claim[ing] on his behalf, that he is the official candidate or the officially endorsed candidate of that party." This language has been construed to mean a "candidate or his workers." (*People v. Crutcher* (1968) 262 Cal.App.2d 750, 752-753, 68 Cal.Rptr. 904, 906.)

Thus, party central committees and their members would not be within the ambit of § 29430 if they endorsed, opposed or supported candidates for their party's nomination for partisan office at the primary election. Moreover, the proscribed conduct is the fraud of claiming to be the "official candidate or the officially endorsed candidate of the party." An endorsement by a central committee cannot confer such status on a candidate; it is attained only by receiving the party's nomination at the primary election.[3]

The existence of the statutory prohibition of Elec. Code § 11702 provides members of a ballot-qualified political party with the means to invoke the state judicial power to enforce the right they have traditionally had in California politics to central committees which do not endorse, support or oppose candidates for the party's nomination for partisan office. California adheres to the view that a political dispute within a political party is not justiciable unless there is a statute which controls the issue. (Cf. *Malone v. Superior Court* (1953) 40 Cal.2d

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3. The basis for plaintiffs' allegation that party central committees, their members, and individual party members who take part in the process are subject to criminal prosecution for endorsing candidates for the party nomination for partisan office is Elec. Code § 29430. (See paragraphs 38 and 39 of First Amended Complaint. App. 256a.)

546, 551-552, 254 P.2d 517, 520.) A case brought by a member of the Republican Party invoking the political right protected by Elec. Code § 11702 is currently pending before the California Supreme Court in *Spinosa v. Republican County Central Committee of San Francisco* (Docket No. SF 24914.)[4]

Members of county central committees are elected by members of their party at primary elections conducted by the state. (See e.g., Cal. Elec. Code §§ 8870 et seq.) Their election obligates them to carry out the function and purpose of the committee which is, under the general direction of the state central committee, to conduct their party's campaign for its nominees for partisan office selected at the primary election.[5] (Cal. Elec. Code §§ 8940, 9276, and 9850.) The derivative obligation not to endorse, support, or oppose candidates is the traditional limitation on the authority of central committees in California party politics that is enforceable by party members through the existence of Elec. Code § 11702. County central committee members are elected knowing and on the condition that as a com-

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4. The First District of California Court of Appeal held in this case that Elec. Code §11702 prohibited the county central committee from endorsing a Republican candidate in a special election to fill a vacant Congressional seat. The plaintiff was a Republican candidate for that office in competition with the candidate who was endorsed. Pursuant to California Rules of Court, the decision of the Court of Appeal was vacated when the Supreme Court granted the petition for review.

5. Although members of central committees are elected at the June primary election, they typically do not assume their duties until January of the following year so that the committee in existence at the primary conducts the party's campaign at the November general election. (Cal. Elec. Code §§ 8920 [Democratic]; 9420 [Republican].)

mittee they will not endorse, support, or oppose candidates for their party's nomination in the primary election.

As this Court noted in *American Party of Texas v. White* (1974) 415 U.S. 767, 787: "Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization." This acknowledgement could aptly serve as the job description of members of county central committees according to the terms of their mandate upon election. If county committees could endorse candidates for the party's nomination, and with such power could continue as a viable institution in California politics, it is entirely likely that a different type of person would be elected to such committees than is elected now.

Party central committees must loyally carry out the party will manifested by nominees selected at the primary by conducting the party campaign for such nominees. In the California direct primary system any voter complying with registration requirements can affiliate with and vote in the primary election of any ballot-qualified party. (See Cal. Elec. Code §§ 501 and 10200.5.) No purported party organization can exclude anyone from membership in a ballot-qualified party.

In such circumstances, a ballot-qualified party defines itself by the nominees it selects to compete in the general election for the policy-making offices of the California and federal governments. The political ethos and traditions of California politics require that a party organization exist which is dedicated to conducting party campaigns on behalf of the party's nominees, whoever they are.[6] As an

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6. If voters in California desire to associate politically and exercise the power to exclude persons with incompatible views

(Continued on following page)

integral part of its primary election system California has through Elec. Code § 11702 provided members of ballot-qualified parties a means of enforcing that political right.

Plaintiffs, associated as the National, Northern and Southern California Committees for Party Renewal, believe that the challenged provisions of the Elections Code "have seriously weakened and debilitated the state political parties." (App. 253a.) Plaintiffs either did not attempt, or failed in the attempt, to convince their fellow party members of this proposition. The state political parties do not have rules which conflict with the challenged statutes nor have they adopted resolutions calling for the repeal of the statutes.[7] Neither the Republican nor Democratic state central committees or officers thereof are parties to this litigation.

Notwithstanding this lack of interest by the state political parties, plaintiffs brought suit in the U.S. District Court for the Northern District of California against defendants, who have had no role in the enforcement of the challenged statutes, to invalidate the statutes as violations of the First Amendment rights of the California Republican, Democratic and Libertarian parties and themselves as members or institutions thereof. The first amended complaint (App. 243a-284a) was filed on or about December 3, 1983.

(Continued from previous page)

from participation in their functions but still compete for control of state and federal policy-making offices, they can place candidates on the general election ballot through the independent nomination process. (Cal. Elec. Code § 6400 et seq.) Moreover, they can work to elect their candidates through the "write-in" process. (Cal. Elec. Code §§ 17100-17101.)

7. Repeal could be affected through action of fellow party members in the State Legislature or through the initiative process. (Cal.Const., art II, §§ 8, 10.)

Answers were filed in December 1983 by the District Attorney of Los Angeles County and by the Attorney General on behalf of himself, the Secretary of State and the district attorneys of San Francisco, Santa Clara and Placer counties.[8] The answers: 1) placed the material allegations of the first amended complaint at issue; 2) challenged the subject matter and constitutional jurisdiction of the District Court; 3) raised the insufficiency of the complaint to establish plaintiffs' capacity to sue; 4) objected that necessary or interested parties had not been joined; 5) urged that the court abstain from exercising jurisdiction as to any cause of action so that state courts could determine enforcement responsibility and assess the scope of the challenged statutes and their constitutionality and because the issues were not ripe for adjudication and were political questions; and 6) asserted the failure of the first amended complaint to allege facts for which relief could be granted against defendants.

At about the same time the answers were filed, plaintiffs served sets of requests for admissions and production of documents and interrogatories on the Secretary of State and the Attorney General. The responses provided plaintiffs in late January and early February 1984

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8. Defendant district attorneys of Alameda, Contra Costa and Solano counties filed answers by way of disclaimer of interest in the litigation distinct from the other defendants and sought leave to refrain from participation therein which was granted by the District Court. (App. 235a.)

were voluminous and had been very time consuming to locate, assemble and produce.

In order that the litigation might be resolved sufficiently in advance of the June 1984 primary election so that plaintiffs could endorse candidates, they requested at the status conference, and the District Court issued an order from the bench over defendants' objections (App. 237a-241a), that all motions concerning jurisdiction and the merits be filed within one week thereafter.[9] As ordered, defendants filed a motion to dismiss based on the failure of the first amended complaint to allege facts sufficient to establish a case or controversy pursuant to Art. III of the U.S. Constitution or to state a cause of action and on the non-justiciability thereof and on the ground that abstention was appropriate. Plaintiffs filed a motion for summary judgment consisting of 350 pages of documentation including 25 declarations and 19 exhibits.

In response to the motion for summary judgment, defendants contended through exposition of the facts stated hereinbefore that there had been no demonstration that the challenged statutes created a substantial burden on the First Amendment rights of the parties. A declaration was submitted demonstrating that the statutes had been enacted at the behest of or with the active support of the major political parties. (App. 105a-113a.) The declaration was supplemented with the by-laws of the California Democratic and Republican parties which manifest organiza-

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9. Documents produced by plaintiffs after the appeal had been argued and initially submitted in the Ninth Circuit indidate that the Committee for Party Renewal had been preparing the case for two years before it was filed.

tions, membership and procedures of their state central committees that are consistent with the challenged statutes. (App. 140a-231a.) Defendants relied on the same declaration in support of their contention that each statute was necessary to further a compelling state interest in the stability and fairness of its electoral system. Defendants also responded with a declaration demonstrating pursuant to Fed. R. Civ. P. 56(f) that discovery was essential to respond to documentation and declarations submitted by plaintiffs (App. 114a-124a) if over defendants' objections as to the sufficiency of the declarations as evidence the court were to rely upon them.

At the hearing on the motions held on April 9, 1984, the District Court heard argument and announced a ruling: (1) denying defendants' motions; (2) abstaining from deciding but retaining jurisdiction on the cause of action regarding a supposed statutory bar on endorsements by central commitees of candidates for non-partisan offices; (3) denying plaintiffs' motion for summary judgment as to those statutes prescribing meeting times and dues limitations; (4) but granting the motion as to the bar on partisan endorsements and prescription of membership and terms of chairpersons of state central committees. (App. 42a-66a.) The District Court rejected defendants' request for an opportunity to respond to additional declarations submitted by plaintiffs, which had been served on defendants at the hearing, and to conduct discovery as indicated in their declaration in response to the motion or, in the alternative, a stay pending appeal, and instructed them that their only recourse was to the Court of Appeals.

Judgment was entered on April 16, 1984. On the same day defendants filed their notice of appeal and emer-

gency motion to the Ninth Circuit for a stay pending appeal. By order filed April 24, 1984, the Court of Appeals granted the motion for a stay and, the motions panel apparently having constituted itself on the panel to decide the appeal, ordered the appeal to be heard on May 15, 1984, and any additional briefing by the parties to be filed simultaneously on May 8, 1984. (App. 88a.) The opinion of the District Court was filed on May 3, 1984. (App. 42a.)

After the matter had been argued the Court of Appeals issued an order on May 25, 1984, partially remanding the case to the District Court. (App. 87a.) The District Court responded with an order filed June 1, 1984. (App. 73a-78a.) The course of further proceedings of the Court of Appeals prior to issuance of its judgment on June 18, 1986, is outlined by orders set forth at App. 83a-86a. The significance of the proceedings and judgment are discussed *infra*.

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FEDERAL QUESTIONS ARE SUBSTANTIAL

There are two compelling reasons this Court should accept jurisdiction and afford plenary review of this case.

1. First, this case manifests the need to resolve the confusion and the resulting damage to states' authority to regulate their electoral systems created by the failure of lower federal courts to distinguish between decisions of this Court typified by *Storer v. Brown* (1974) 415 U.S. 724 and *Marchioro v. Chaney* (1979) 442 U.S. 191 which outline the First Amendment considerations applicable to the states' ability to regulate state political parties and those decisions which define constraints on state regulation of national political parties typified by *Democratic*

Party v. Wisconsin ex rel. La Follette (1981) 450 U.S. 107, *Cousins v. Wigoda* (1975) 419 U.S. 107 and *Williams v. Rhodes* (1968) 393 U.S. 23.

As Mr. Justice Powell noted in his concurring and dissenting opinion in *Cousins v. Wigoda, id.*, at fn., p. 497: "I also agree with the Court that this case intimates no views regarding other efforts to regulate party conventions. Congressional regulation of national conventions or state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance."

In *Marchioro v. Chaney, id.*, at 196-197, this Court recognized that state statutes prescribing the existence and composition of central committees for state political parties and vesting them "with authority to perform limited functions . . . directly related to the orderly participation of the political party in the electoral process" serve an unquestionably legitimate state interest in promoting an orderly and fair electoral process which the Court acknowledged earlier in *Storer v. Brown, id.*, at 730. As the Court noted in *Marchioro, id.*, at n. 11, p. 195, California is among the states with such statutes.

California requires that all of its primary election ballot-qualified political parties have state and county central committees and prescribes the membership thereof. The state central committees are mandated by statute to "conduct *party* campaigns for this party and in behalf of the candidates of this party" and this is virtually the sole duty mandated by statute to these committees. Plaintiffs-appellees have not questioned the constitutionality of mandating this function to the state and county central com-

mittees just as the plaintiffs in *Marchioro* did not question the statutorily mandated duties of the state committees for political parties in the State of Washington (442 U.S. at 197). Nor do they question mandate's direct relationship to promotion of an orderly and fair electoral process.

The role of a central committee, being in charge of the party's campaign for its nominees in the general election, enables it to provide a catalyst through which the intra-party bitterness and competiveness of the primary election contest can be diffused, mediated, and transformed by its having access to the resources previously devoted to unsuccessful candidates or factions which otherwise would be unavailable to the nominees. The resources brokered by the central committee can either be directed to the nominees' own campaigns or into precinct work, advertisements, such as slate mailings, and other activities conducted by the central committee on behalf of the party nominees. These considerations were presented to the District Court through declarations and documentation. (See App. 106a-108a and 146a-147a.)

The mandated role of the central committee serves an interest of California which this Court characterized as "compelling" in *Storer v. Brown*, *supra*, 415 U.S. at pp. 734-736. Measures taken to deflect intra-party rivalry aroused in the primary election from carrying over to the general election, which in *Storer* was the prohibition on candidates defeated in the party primary competing against the party nominee in the general election, were acknowledged to further "the state's interest in the stability of its political system" because diffused intra-party rivalry in the general elections enables political parties'

candidates to constitute "understandable choices" and promotes securing the party "win[ning] in the general election with sufficient support to govern effectively." The principle that the First Amendment does not exclude states from regulating the internal relationships of members of ballot-qualified political parties was heralded with specific reference to California's political tradition when the court stated:

> "A state need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."

A central committee which is embroiled in the intra-party feuding of the primary election by endorsing candidates, whether they win or lose, can deprive the party of the neutral broker for marshalling the resources of the party for the general election which state law and political tradition have provided for it. (See App. 106a-108a and 146a-147a.) The statutory ban on such endorsements enforceable by party members, which is essential to preservation of the vehicle for promoting the state's interest in a stable political system, must be considered to have the same constitutional validity as the vehicle itself.[10]

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10. The California political tradition and ethos of rejecting the politics of unrestrained factionalism and adhering to the ban on endorsements by party central committees is unquestionably alive and well. At the June 3, 1986, primary election, Proposition 49 to amend section 6 of article II of the California Constitution to prohibit party central committees from endorsing candidates for non-partisan office was adopted by 55.9% of

(Continued on following page)

Moreover, there was very significant evidence before the District Court that the challenged statutes reflect the policies of the political parties.

The bylaws of the California Democratic and Republican parties introduced into the record by defendants (App. 149a-231a) indicate that each party has adopted the statutorily prescribed central committees as their governing bodies with duties in addition to the only duty prescribed by statute—to conduct the campaign of the party.[11] In *Marchioro v. Chaney, supra,* 442 U.S. at 195-199, the same situation by virtue of being voluntary was held not to constitute a substantial infringement of the party's First Amendment rights especially where plaintiffs did not challenge the duties assigned to the committee just as plaintiffs herein have not. The Libertarian state central committee does not purport to challenge the membership prescribed for it by statute.

(Continued from previous page)

the vote. (Statement of the Vote by the California Secretary of State for June 3, 1986 Primary Election, at p. 50.) The amendment nullifies the holding in *Unger v. Superior Court* (1984) 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238, that California law did not ban such endorsements. A cause of action in this case was that pre-existing law did ban such endorsements. (See App. 264a-276a.) The District Court abstained on that cause of action while *Unger* was pending before the California Supreme Court.

11. Defendants also submitted a declaration of former State Senator Albert S. Rodda, Jr. which provides testimonial evidence based on his long-term experience as a state legislator and member of the Democratic State Central Committee that the challenged statutes affecting the major political parties were enacted "at the request and with the concurrence of the party affected." (See App. 106a-107a.) Senator Rodda also testified that the major parties also have consistently supported the statutory ban on endorsements. (App. 107a.)

The lower courts in this case viewed this Court's decisions regarding state interference with the national party conventions as an absolute ban on state regulation of political party activity generally and as superseding the cases which indicate that different considerations are involved with state regulation of state political parties. The decisions below, which are premised on this perception, will invalidate key features of California's political tradition and ethos which is still vital after seventy years of defining its direct primary system. The compelling circumstances of this case warrant this Court accepting jurisdiction and affording plenary review to further explore the aforesaid unresolved constitutional issues.

2. Moreover, the manner in which the Ninth Circuit and the District Court dealt with the significance of the Republican and Democratic bylaws in terms of *Marchioro* and jurisdictional analysis and with other matters discussed, *infra*, so far departed from the accepted and usual course of judicial proceedings that this Court should accept jurisdiction and afford plenary review to exercise its power of supervision concerning issues of justiciability, constitutional jurisdiction, and proper implementation of rule 56 of the Federal Rules of Civil Procedure. (Cf. rule 17.1(a) of this Court.)

The Court of Appeals asserts that appellants "made no showing that the political parties have voluntarily adopted the statutory restrictions"; and elaborates that "[i]ndeed, the uncontroverted affidavits of *party representatives* indicate the contrary: they would reform the composition of their parties' central committees if the statutes were invalidated." (App. 15a; emphasis added.)

In responding to plaintiffs' motion for summary judgment defendants filed the bylaws of the Republican and Democratic parties and the declaration of Albert Rodda as described, *supra,* at p. 20 and n. 11. Senator Rodda's statements concerning amendments to statutes regarding the structure of the central committees of the major parties being at their request are based on his personal knowledge as a state legislator for 22 years and a member of the Democratic state central committee for the same period. Moreover, as this Court noted in *Anderson v. Celebrezze* (1983) 460 U.S. 780, 803, n. 30, election laws of most states are established by the major parties.

Thus, at the very least defendants presented evidence from which inferences could be drawn that the statutes are not in conflict with the policies of the parties concerning their structure and organization and that the parties actually support the statutes. Such evidence could support a finding after a trial that the statutes prescribing the structure of a ballot-qualified party do not substantially burden the First Amendment rights of the party and its members. The evidence certainly demonstrates that there is a genuine issue of material fact for trial and that summary judgment is not authorized pursuant to Fed. R. Civ. P. 56.

Nevertheless, the District Court and the Court of Appeal ruled on the summary judgment motion as if they were reviewing the record of a trial and in effect made findings resolving what they perceived as conflicting inferences or based on their perception of the weight of the evidence. Of course, the defendants were precluded by

the course this case took from conducting discovery[12] or putting on evidence at a trial. The issue of the impropriety of summary judgment in this case was raised by defendants on appeal. (App. 92a-93a.) The opinion of the Court of Appeals does not address this issue.

This Court has had occasion to instruct that proper judicial administration of Rule 56 requires that where as here the manner in which a governmental program or system works is critical to resolution of a constitutional claim

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12. Defendants submitted a declaration pursuant to Fed. R. Civ. P. 56(f) regarding the need for discovery to respond to plaintiffs' voluminous motion for summary judgment concerning the issues of substantial infringement and standing. (App. 114a-124a.) The District Court acknowledged that defendants could not conduct formal discovery in response to the motion (App. 232a-234a) and the Court of Appeal acknowledged that the preclusion of discovery was prejudicial in a partial remand to the District Court on May 25, 1984. (App. 87a.) The District Court's order filed June 1, 1984, in response to the remand rejected any opportunity for discovery. (App. 74a-78a.) The District Court ruled within a week of the order on remand without conducting a hearing, receiving any briefing from the parties or considering anything which was not in the record prior to appeal. The remand order issued because defendants provided the Court of Appeals with evidence received from members of one of the purported plaintiff county central committees after judgment had been entered by the District Court that the committee had not authorized participation in this litigation. After the District Court order on remand was filed plaintiffs produced bylaws and what purported to be minutes, heavily censored, of most of the purported plaintiff county central committees. These documents raised very serious questions as to whether any of the purported plaintiff committees including the Libertarian state central committee had authorized participation in this litigation. On June 18, 1984, the Court of Appeals authorized briefing on the subject of committee authorization. (App. 86a.) The Court of Appeal was provided with the documents produced by plaintiffs along with briefs from appellants and appellees. The opinion of the Court of Appeals does not address these issues.

the matter should not be decided "without fully developing the factual record at a hearing." *Askew v. Hargrave* (1971) 401 U.S. 476, 479; see also *Kennedy v. Silas Mason Co.* (1948) 334 U.S. 249, 257. This case demonstrates a critical need for this Court to reassert and enforce this important principle in the administration of the federal judiciary.

The circumstances of the lower court's handling of the "substantial infringement" question raise even more fundamental issues of constitutional adjudication. The absence of the state central committees of the Republican and Democratic parties from this litigation and the total absence of any formal action by either calling for the repeal of or enacting rules in conflict with the statutes at issue in this litigation highlight serious problems of justiciability.

The Court of Appeals referred to plaintiffs as "party representatives" who reflect the position of their parties. There is no basis for this conclusion in the record. As indicated in n. 12, *supra,* there are serious questions as to whether the only political party entities purportedly parties to this litigation have authorized such participation. There are 58 counties in California. Only one Republican county central committee and six Democratic county central committees are purportedly parties to this litigation. Some of the Democratic committees did not subscribe to all of the causes of action which turn out to be the same causes to which their plaintiff chairpersons are not parties. The Committee on Party Renewal recruited central committees for this litigation for two years. Even if the subscription of committees is authentic it is hardly representative of either political party. Moreover, these committees were not elected to be party policy makers; they were elected to conduct general election campaigns for the party.

There is nothing in the record of this case to indicate that the adjudication of the validity of the challenged statutes constitutes anything other than an advisory opinion with respect to state central committee structure and bestowal of a political advantage on members of an ideological faction to make endorsements in the name of an entire party when they were elected with the long-standing political disability to do so.

Absent a clear showing of conflict between party policy and state statutes such as that manifested in *Republican Party of State of Conn. v. Tashjian* (2d Cir. 1985) 770 F.2d 265, 268-270, *prob. juris. noted,* 106 S.Ct. 783 (1986) (Docket #85-766), a claim that there is a substantial burden on the party's First Amendment rights cannot reasonably be considered justiciable within the limitations of article III of the U.S. Constitution. In *Tashjian, id.,* the state central committee developed a proposed party rule change to allow unaffiliated electors to vote in the Republican primary; the committee called a convention of the party at which the rule was adopted; the rule conflicted with a state statute prohibiting unaffiliated voters from participating in a party primary; Republican state legislators introduced legislation to permit unaffiliated participation where party rules allow; the Democratically controlled Legislature rejected the legislation; litigation then ensued.

CONCLUSION

For the reasons presented above probable jurisdiction should be noted and the Court should set the matter for plenary consideration.

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Respectfully submitted,

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